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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

ALFREDO OLIVAS,

Petitioner,

v.

RICHARD BOEH, an agent of the Federal Bureau of Investigation,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May an executive branch regulation promulgated pursuant to a federal housekeeping statute operate to strip a United States court of its power to compel evidence?

2. May the head of a federal agency make a conclusive determination not to produce evidence sought by a federal court?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents..... ii

Table of Authorities iii

Opinions Below 1

Jurisdiction..... 2

Statutes and Rules Involved 2

Statement 3

Reasons For Granting The Petition..... 8

I. 8

II. 14

III. 24

TABLE OF AUTHORITIES

Page

Cases

In Re Boeh, 25 F.3d 761 (9th Cir. 1994) 1

Chrysler Corp. v. Brown, 441 U.S. 281 (1978) 10-11

Commodity Futures v. Schor, 106 S.Ct. 3245 (1986) 18, 22

Crumpton v. Gates, 947 F.2d 1418 (9th Cir. 1991) 5

Gomez v. Gates, 804 F.Supp. 69 (C.D. Cal. 1992)..... 1

Harvey Aluminum v. NLRB, 335 F.2d 749 (9th Cir. 1964)..... 11

INS v. Chadha, 462 U.S. 919 (1983) 23

Marbury v. Madison, 5 U.S. 137 (1803) ..9, 10, 11, 12, 13

NLRB v. Capitol Fish Co., 294 F.2d 868 (5th Cir. 1961)..... 11

Perkins v. ELG, 307 U.S. 325 (1939)..... 10

SEC v. Chenery, 318 U.S. 80 (1943) 10

U.S. ex rel. Touhy v. Ragen, 340 U.S. 462 (1951) 24

Statutes & Rules

5 U.S.C. 301 ..... *passim*

28 U.S.C. 1254(1) 2

Rule 46, F.R. App. P. 2

Rule 45, F.R. Civ. P. 3

Rule 104, F.R. Evid..... 3

28 C.F.R. 1622(a)..... *passim*

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Aristotle, *Politica*, book VI 18

Federalist Papers, No. 47 (Madison) 19

Federalist Papers, No. 78 (Hamilton) 19-20

Frankfurter, Felix, 68 Harv. L.R. 217 (1955) 9

Hand, Learned, papers, box 190-file 13 9

Holmes, Oliver Wendell, *Collected Papers*, 270 (1920) 9

Montesquieu, *Spirit of the Laws*, (1748), book XI 18

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PETITION FOR WRIT OF CERTIORARI

Alfredo Olivas petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals in this case (App. A, *infra,* 1a-31a), is reported at 25 F.3d 761 (9th Cir. 1994). The underlying facts in this case are set forth in *Gomez v. Gates,* 804 F. Supp. 69 (C.D. Cal. 1992) (App. B, *infra,* 1b-23b). The district court's opinion is submitted as

a separately-bound Appendix C because it was filed under seal and remains under seal.

JURISDICTION

The judgment of the Court of Appeals was entered on May 27, 1994, F.R. App. P. (West 1994) Rule 36. At the time judgment was entered, there was pending before the court a petition for rehearing with a suggestion for rehearing *en banc*. On July 8, 1994, the petition for rehearing was denied and the suggestion for rehearing *en banc* was rejected. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1), and this Petition is timely pursuant to Supreme Court rule 13.4 because it is filed within 90 days' of the July 8, 1994 denial of the petition for rehearing.

STATUTES AND RULES INVOLVED

5 U.S.C. 301 provides:

> The head of an Executive department . . . may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

28 C.F.R. 1622(a)(1991), promulgated under the authority of 5 U.S.C. 301, provides:

> In any federal or sate case or matter in which the United States is not a party, no employee . . . of the Department of Justice shall, in response to a demand, produce any material contained in files of the Department, or disclose any information relating to or based upon material contained in the files of the Department, or disclose any information or produce any material acquired as part of the performance of that person's official status without prior approval of the proper Department official. . . .

Rule 45, F.R. Civ. P. (West 1994), in pertinent part, provides:

> 45(a)(2): A subpoena commanding attendance at a trial . . . shall issue from the court for the district in which the . . . trial is to be held.
>
> 45(e): Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued.

Rule 104, F.R. Evid. (West 1994), in pertinent part, provides:

> Preliminary questions concerning the qualification of a person to be a witness, [or] the existence of a privilege . . . shall be determined by the court. . . .

STATEMENT

This Petition arises from the so-called Big McDeath Squad Case. In 1966, the Los Angeles Police Department

formed a unit known as the Special Investigations Section, or S.I.S. That unit functioned both off the organizational charts and without knowledge of either the Los Angeles Mayor or the public until its existence was exposed in a September 1988 investigative journalistic article in the Los Angeles *Times* authored by investigative reporter David Freed.

It was revealed in that article and in the trial of the underlying action, *Gomez v. Gates,* that it was the mission of this secretive, paramilitary unit[1] to identify potential and/or recidivist criminals, to track them for as long as it took to observe them in the commission of a crime, and then to apprehend them. What might otherwise have been a good ideal got out of hand over the years, as the unit progressed and continued to function both in a so-called elite status, with little internal supervision, and with no outside scrutiny.

Because it functioned "off the charts" as it were, and because, as Los Angeles former Mayor (from 1973 to 1992) Tom Bradley (who at his retirement in 1962 had been a member of the LAPD for over twenty years himself) admitted in testimony, he had no idea the unit either existed or functioned as it did, for many years the S.I.S. went about its business without notice.

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[1] Much as it is the mission of Great Britain's Special Air Services, or S.A.S., or France's *Compagnie Republican Sécurité, or C.R.S., to operate in secret to hunt down suspected criminals outside the confines of the organizational charts.*

As the evidence at trial proved, in at least 45 instances in which S.I.S. members had stalked its suspects, 28 were shot dead (almost all with no wounds except in their backs) and 27 other seriously were wounded. One unarmed man died after receiving 38 bullet wounds in his back, some of them through the bottoms of his feet. *See Crumpton v. Gates*, 947 F.2d 1418 (9th Cir. 1991).

It was against this backdrop that the facts of this case were presented to the jury. The underlying litigation arises from a February 12, 1990 incident in which S.I.S. members tracked, stalked, and eventually murdered three Latino men, and wounded one seriously (the Petitioner), in connection with the burglary and robbery at a McDonald's eatery in a northern part of Los Angeles, Sunland. Petitioner escaped death from a barrage of at least 24 shotgun blasts by S.I.S. members into the car in which he was a rear seat passenger only because one of the men murdered slumped over him providing him a shield against mortal wounds.

The 22 S.I.S. members aided by an LAPD support helicopter tracked the four men from Venice, California to Sunland, based on a tip that the men planned to stick up the Sunland McDonald's. The squad members surreptitiously watched the four men case the McDonald's, let them break in, cancelled a 911, emergency call for assistance from the McDonald's manager who was inside counting the day's cash receipts, and then let the four men cross the street and get into their car in which they had arrived.

Using what they termed a "jamming" technique, the squad members pinned shut the doors of what was to have been the getaway car, and then, after claiming they had seen a gun on the inside of the car (through the heavily tinted windows and at 1:00 A.M.), unloaded at least 24 shotgun blasts into the car. One man somehow escaped from the death trap through the front passenger door, and he was shot down and killed as he fled up an urban slope. One man in the back seat still was alive, and the officers opened the rear door and blew off the back of his head from a distance of one and one-half feet in what the medical examiner described as a rapidly fatal wound. The car's driver was finished off the same way. Petitioner was sitting in the passenger back seat and survived only because the man whose head was blown off slumped across him, thereby somehow blunting the additional bullets that hit Petitioner after the *coup de Jarnac-encore un coup-coup de grâce.*

Petitioner brought a civil rights action against the death squad members, alleging the use of excessive force.

On the day the trial commenced, January 7, 1992, Petitioner served a subpoena on Respondent, who was the F.B.I. special agent[2] assigned to investigate for the Justice Department (DOJ) the events of February 12, 1990. Petitioner believed that Respondent had in his possession material information that would inculpate defendant death squad members. Petitioner's purpose in serving the subpoena on Respondent was to get the benefit of

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[2] The F.B.I. has only "special" agents, and no non-special agents: thus the adjective "special" has no denotative meaning.

Respondent's testimony and his conclusions as to what actually had occurred at the scene of the murders and shooting.[3]

On the instruction of DOJ, Respondent not only refused to testify, but also disobeyed the district judge's order to appear *in camera,* with a sealed record, but not under oatn and to answer the district judge's questions that would permit the district judge to learn what Respondent knew about the alleged civil rights violations and to determine, among other things, whether *vel non* Respondent would be ordered to testify at all, and what limits, if any, would be placed on Respondent's testimony.[4] Respondent refused to obey all orders by the district judge: to appear *in camera* to enable the district judge to exercise his functions under Rule 104, F.R. Evid., to answer the district judge's questions, and to testify.

The district judge held Respondent in contempt of court, and then denied the motion to quash the subpoena. Again, Respondent was ordered to comply with the district judge's orders, again Respondent refused to do so, and again Respondent was held in contempt.

Respondent took a recalcitrant witness appeal pursuant to 28 U.S.C. 1826(b), the trial was suspended for over a month in order to accommodate the various needs caused by Respondent's recalcitrance, and on February 18, 1992, the Court of Appeals reversed the orders of the

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[3] With the statute of limitations to run out in February 1995, it is no surprise to Petitioner that no criminal action has been filed by the Justice Department against the squad members.

[4] See Appendix C filed under seal.

district court, but did not issue an opinion until nearly two and one-half years later on May 27, 1994.

The trial resumed in late February 1992, and on March 31, 1992, the jury unanimously returned a verdict in favor of all plaintiffs, and against both the death squad officers at the scene and then-LAPD chief Daryl Gates for both compensatory damages and punitive damages. (Though the S.I.S. unit still has not been disbanded, none of its members has been reported to have caused a death since March 31, 1992.)

REASONS FOR GRANTING THE PETITIONER

1. The opinion below strips the federal courts of their power to compel evidence and to determine what evidence shall be compelled to be given; and

2. There has been a faulty construction given to a federal regulation, and that construction places the provisions of the regulation above the power of the federal courts to compel the provision of evidence.

I

In this case, it almost is beside the point that, as the district judge said: "The Justice Department has made a decision to put its own interests above the interest of justice in this case." (Quoted in dissent of Judge Norris, App. at 18a.) What DOJ did in this case served no one, including itself, and gave new reason to heed the warnings of learned jurists who railed against usurpation of

judicial power by bureaucrats who attempted to put themselves above and beyond the reach of the courts.

Describing these forces, Judge Learned Hand decried

> [t]hese bureaucrats [who] will go just as far as they are allowed [,] [and whose] ipse dixits (which I have looked up in a lexicon and which means, 'For he himself has said it and it's greatly to his credit that he *is* an Amurri*can*') [are] to be the substitute for what the statute provides. . . . If we don't do anything now, we never shall, – we are really telling these high-binders that they can do what they damn well please.

Collected Papers of Judge Learned Hand, box 190-file 13 (*U.S. v. President Wilson*, December 20, 1932). What DOJ so far has gotten away with here is precisely the evil against which Hand railed in 1932.

We got in 1789 "a new body of jurisprudence, by which guiding principles are raised above the reach of statute and State, and [in which] judges are entrusted with a solemn and hitherto unheard-of authority and duty." Justice Oliver Wendell Holmes, *Collected Papers*, 270 (1920). In *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 2 L.Ed.60 (1803), Chief Justice John Marshall "released an enduring spirit, a mode of approach for generations of judges charged with the awesome duty of subjecting the conduct of government and the claims of individual rights to the touchstone of a written document, binding the Government and safeguarding such rights." Justice Felix Frankfurter, *John Marshall and the Judicial Function*, 68 Harv. L. Rev. 217 (1955).

> himself injured has a right to resort to the laws of his country for a remedy.
>
> [T]his be the rule. . . .

5 U.S. at 166. *Marbury* established the principle of the power of the judiciary to review executive branch decisions that are not political decisions. It was not argued in this case that the decision not to permit Respondent to testify was a political decision. What was argued was that Sections 301 and 1622(a) operated to confer on the executive branch power to make judicial decisions, in clear derogation of *Marbury*.

Indeed, "[t]he question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority." 5 U.S. at 167. Here, in the first instance, the district judge correctly decided that it was he who had to try the question whether *vel non* there should be testimony, and in overruling his decision the Court of Appeals clearly erred as a matter of law.

Respondent could be "compelled to obey the judgment of the law[,]" *id.* at 170, and his correct punishment for his disobedience was contempt.

Because "the constitution vests the *whole* judicial power of the United States in one supreme court, and such inferior courts as congress shall . . . ordain and establish[,] [and because t]his power is expressly extended to all cases arising under the laws of the United States[,]" *id.* at 173 (emphasis added), only the trial judge, and not DOJ had the power to decide whether Respondent would have to give testimony. DOJ is not and cannot

be permitted to be above the federal court system. Neither Section 301 nor Section 1622(a) hint that DOJ may do what it did here.

It is precisely because the "original and supreme will organizes the government, and assigns to different departments their respective powers[ ] [and] establishes certain limits not to be transcended by those departments[ ]" 5 U.S. at 176, that the executive branch is without power to override the power of the judicial branch. Otherwise, "[t]he distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed. . . . " *Ibid.*

> It is emphatically the province of and duty of the judicial department to say what the law is. . . . If two laws conflict with each other, the courts must decide on the operation of each. . . . [T]he court must determine which of these conflicting rules governs the case: This is the very essence of judicial duty.

Id. at 177-78.

Because "[t]he judicial power of the United States is extended to all cases arising under the constitution[,]" *id.* at 178, and because this case arose under the Constitution, the district court had the power and the duty to decide who would be compelled to testify. It did precisely that, and the Court of Appeals opinion overturning that decision is incorrect.

Based on the principles first set forth in *Marbury*, and pursuant to the court's inherent power to compel testimony, and the provisions of Rule 45, F.R. Civ. P., and Rule

104, F. R. Evid., the district judge correctly ordered Respondent to provide *in camera* answers to the district judge's questions, so that the district judge could, in the first instance, exercise his discretion under Rule 104 and then determine what action to take under Rule 45(e). By taking the recalcitrant and defiant action it took, DOJ prevented the district judge from exercising his powers and carrying out his oath of office. By obeying the *ipse dixit* of DOJ Respondent committed contempt.

Because no executive branch officer has the power to interfere with or to limit the power of the judicial branch, absent a specific and express authorization to do so, Respondent's refusal to obey the district judge's orders constituted acts of contempt of court.

Any other conclusion would operate to strip the federal courts of their power to adjudicate disputes properly before them.

II

A faulty construction has been given to two important federal legal provisions, 5 U.S.C. 301, and 28 C.F.R. 1622(a)(1991).

The Court of Appeals opinion interprets the two subject Sections in a way that is violative of the doctrine of separation of powers, and that confers on the executive branch the power to control the quintessentially judicial function of determining what evidence is to be presented in judicial proceedings.

Though the Court of Appeals claims it "give[s] no such effect to the regulation," App. A at 9a, its words ring

hollow when compared to what it actually did. Indeed, the Court of Appeals did give DOJ what it concedes is "the . . . exclusively judicial power to determine what evidence will be admitted in a civil trial." *Ibid.* The court says that it "conclude[s] only that plaintiffs selected an improper method of attempting to compel Boeh's testimony." But a proper method to compel that testimony was by subpoena, and Petitioner had the right to utilize that subpoena power notwithstanding the *ipse dixit* of DOJ that *it* could decide both for itself, for the district court, and for the Petitioner the manner in which Petitioner could seek to compel testimony.

The Court of Appeals attempts a facile avoidance of the point by saying that Respondent "did it the wrong way" – Respondent "selected an improper method of attempting to compel Boeh's testimony." Yet, Petitioner had a right, and the Court of Appeals nowhere purports to educate as to why or how Petitioner did not have the right, to subpoena Respondent. The Court of Appeals does not claim that there is an interplay between Section 301 and Section 16.22(a), on the one hand, and Rule 45, F.R. Civ. P., on the other hand. Nor does it claim that the provisions of either Section 301 or Section 16.22(a) operate to strip a litigant in the federal courts of the subpoena power of Rule 45, or in any wise to diminish that power. The Court of Appeals only cryptically, and with no exegesis, says only that Petitioner did it the wrong way. If this were to be so, then, at a minimum, there would need to be an explanation either that the provisions of Sections 301 and 16.22(a) supersede, override, or supplant the provisions of Rule 45, or that the provisions of Sections

301 or 16.22(a) operate as a limitation on the power of the district court.

No special or exclusive way in which to get testimony from an F.B.I. agent in a federal civil proceeding is provided anywhere, and in any event any method chosen by a party litigant in a federal judicial proceeding in which jurisdiction is established over a person could not operate to strip the federal court of any power it had in the first instance. None of the statutes or rules in issue either confers or diminishes federal judicial jurisdiction or power, and neither DOJ's *ipse dixit* nor the Court of Appeals' "he did it the wrong way" avoidance can be dispositive of the issue of whether *vel non* the district judge had the power to do that which he did: (1) ask questions in order to be able to have a predicate on which to base an exercise of his discretion; and (2) adjudicate in contempt a person over whom the court had personal jurisdiction (when that person contemptuously disobeyed a lawful order).

No statute, including 5 U.S.C. 301, and no regulation, including 28 C.F.R. 1622(a), operates to divest either a district court of the power to decide for itself whether or not to compel testimony, or to divest the Petitioner from using the provisions of Rule 45, F.R. Civ. P. to compel testimony. Here, there is not even any form to put over substance, but still there is a claim that some form nevertheless prevails over substance.

The court's holding that "in the absence of a direct challenge to the Attorney General's decision to withhold permission and a ruling that permission was improperly withheld, Boeh cannot be held in contempt for refusing to

testify without permission, pursuant to 28 C.F.R. § 16.22(a)[,]" App. A at 15a, is unfounded and absurd, and none of the cases it cites in support of its holding supports that holding.

As the dissent aptly points out:

> '[j]udicial control of the evidence in a case cannot be abdicated to the caprice of executive officers.' *United States v. Reynolds*, 345 U.S. 1, 9-10 (1953). That is exactly the effect of the stand taken by the Attorney General in this case. If allowed to stand, today's decision 'would upset the constitutional balance of a "workable government" and gravely impair the role of the courts under Art. III.' *United States v. Nixon*, 418 U.S. 683, 707 (1974).

The most important reason this Court should grant certiorari in this case is to prevent the abdication of control of evidence in a case to the executive branch of government. The fundamental principle of our democracy that, among the powers of our courts is the power to make all rules necessary to govern their practice for the orderly conduct of their business, *Washington-Southern Co. v. Baltimore Co.*, 263 U.S. 629 (1924), derives from the doctrine of separation of powers that is enshrined in article III of the Constitution. That doctrine has a long and pertinent history.

"Article III, § 1, serves both to protect the role of the independent judiciary within the constitutional scheme of tripartite government [citation omitted], and to safeguard litigants' right to have claims decided before judges who are free from potential domination by other branches of government [citation omitted]." *Commodity Futures v.*

Schor, 106 S.Ct. 3245, 3255 (1986). Article III, § 1, derives from a long and pertinent tradition that explains the reasons for separation of governmental powers.

The concept of division of the powers of government appears first in Aristotle's *Politica*, where he posits that "[t]he basis of a democratic state is liberty . . . [,]" *id.* book VI:1[5], and discusses the different forms of government he believes appropriate to serve democratic societies. His passing reference to the need to "carefully consider which offices [of a government] may properly be united and which separated[,]" *id.* at VI:8, served as the basis two millenia later for Montesquieu's discussion of the same topic in book XI of his *Spirit of the Laws* (1748).

Montesquieu's fundamental libertarian belief that "men entrusted with power tend to abuse it," led him to the theory of "checks and balances" in government in order to keep to a minimum the powers lodged in any single organ of government, and so that organs of government would function in opposition to one another. *Ibid.*

Montesquieu, following Aristotle's ideal that the basis for democracy is liberty, posited that "[t]here can be no liberty . . . if the power of judging be not separated from the legislative and executive powers." *Ibid.* "Were the power of judging . . . joined to the executive power, *the judge* might behave with all the violence of *an oppressor.*" *Ibid.* Montesquieu's ideas on separation of powers were embraced by the Founding Fathers of the

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[5] "The Works of Aristotle Translated into English," Oxford 1921, *Politica*, translated by Benjamin Jowett.

United States of America. *See Federalist Papers*, especially Nos. 47 (Madison), and 78 (Hamilton).

Madison spoke generally of the necessity for a separation of the functions and powers of government, basing his argument in *Federalist No. 47* directly on Montesquieu.

> [T]he legislative, executive, and judiciary departments ought to be separate and distinct[] [as an] essential precaution in favor of liberty.
>
> The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny. . . . [N]o further arguments would be necessary to inspire a universal reprobation of the system [that accumulated unseparated powers]. . . . [T]he preservation of liberty requires that the three great departments of power should be separate and distinct.
>
> [W]here the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted. . . . The magistrate in whom the whole executive power resides cannot . . . administer justice in person, though he has the appointment of those who do administer it.

In *Federalist No. 78,* Hamilton discusses, with more attention to the separation between the executive branch and judicial branch, the concept of separation of powers, and the reasons for a specific separation of the judicial department of government from the other governmental departments.

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In *Federalist No. 78*, Hamilton discusses, with more attention to the separation between the executive branch and judicial branch, the concept of separation of powers, and the reasons for a specific separation of the judicial department of government from the other governmental departments.

> [T]he judiciary is beyond comparison the weakest of the three departments of power [citing Montesquieu's pronouncement that "Of the three powers . . . the Judiciary is next to nothing."], that it can never attack with success either of the other two and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislative and the executive. For I agree that "there is no liberty if the power of judging be not separated from the legislative and executive powers[]" [again quoting Montesquieu, *supra*]. [F]rom the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches. . . . [C]ourts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void[] [are the department of government] [w]ithout [which] all the reservations of particular rights or privileges would amount to nothing. The interpretation of the laws is the proper and peculiar province of the courts.

It readily can be seen, in a direct line from Aristotle, to Montesquieu, to Madison and Hamilton, and to the United States Constitution, that democracy is based on liberty; that democracy requires a separation of the various powers of a government – specifically a separation of the executive from the judicial powers of a government – in order to prevent "men entrusted with power [from] tend[ing] to abuse it"; that, since the judiciary may not, itself, enforce its own commands, and therefore, is the

most feeble department of government, it is most important in a government to prevent the judiciary from "being overpowered, awed, or influenced by its co-ordinate branches [of government];" that it is the duty of the courts to declare acts contrary to law; and that, quintessentially, "[t]he interpretation of the laws is the proper and peculiar province of the courts."

Respondent here seeks to challenge the very fabric of our constitutional heritage, and seeks, by attempted arrogant attornment and arrogation, to overpower and to improperly influence the district court with *ipse dixit* – so called by the district court – that only DOJ can decide who shall testify in a judicial proceeding.

Our common constitutional heritage, our Constitution, and our laws all prohibit that executive department of our government from deciding that Respondent shall not give testimony. It is the very sort of arrogance and arrogation attempted here by the executive branch that, in the very first instances, made a separation of powers desirable.

The United States Constitution provides for three departments of government, invests each department with specific, enumerated powers, and constructs a careful system of checks and balances among those departments. U.S. Constitution, articles I, II, and III.

It provides that "[t]he judicial power of the United States, shall be vested . . . in such inferior courts as the Congress may from time to time ordain and establish." Art. I, sec. 1.

> Article III, § 1, not only preserves to litigants their interest in an impartial and independent

> federal adjudication of claims within the judicial power of the United States, but also serves as an inseparable element of the constitutional system of checks and balances. [Citations omitted.] Article III, § 1 safeguards the role of the Judicial Branch in our tripartite system by barring congressional attempts to transfer jurisdiction . . . for the purpose of emasculating constitutional courts [citation omitted], and thereby preventing the encroachment or aggrandizement of one branch at the expense of the other.

106 S.Ct. at 3256. The same is true with respect to executive attempts, as here, to transfer the decision-making process concerning who will, or will not, testify in federal court to the executive branch. This Court must not permit DOJ to arrogate unto itself the district court's power both to evaluate its own regulations that it asserts as a bar to Respondent's testimony, and to determine who will testify. Such permission would emasculate our court system, and permit a flagrant encroachment on the judicial branch by the executive branch: to the clear aggrandizement of the executive branch at the expense of the judicial branch. The arrogant refusal of DOJ to permit Judge Letts to question agent Boeh *in camera,* flies not only in the face of a long history of F.B.I., D.E.A., A.T.F., Postal, and Customs agents freely revealing to judges *in camera* whatever judges wanted to know in instances in which such agents *wanted something from the judge* – e.g., a search warrant, and common sense: how in the world could any competent attorney believe that there could be any basis on which to assert that Judge Letts abused his discretion by making the orders he made, once Respondent refused

to permit Judge Letts to have facts to be a predicate for the exercise of discretion.

"The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power- . . . must be resisted." *INS v. Chadha*, 462 U.S. 919, 951 (1983). Here, it must be resisted.

As the dissent observed: "[It has not been held] that the Attorney General can arrogate to himself the authority to override the subpoena power of Article III courts by withholding evidence within his administrative control." App. A at 21a. "[Prior decisions by this Court] left undecided the question whether the Attorney General himself could lawfully refuse to obey a court order to produce documents . . . [and thereby] left intact the judicial power to subpoena evidence . . . that the courts determine is needed to decide cases." *id.* at 22a. Because these observations are true, the Court of Appeals erred when it reversed the district court. As the dissent observes also: "the far-reaching question . . . is squarely presented by the Attorney General's refusal to authorize Agent Boeh to testify: may the head of a federal agency make 'a conclusive determination' not to produce evidence sought by a federal court?" *Id.* at 24a.

The dissent answers this question in the negative, and this Court must grant certiorari so that it, too, may answer this question in the negative in order to put pay once and for all to the attempts of the executive branch to arrogate to itself power that may be possessed only by the judicial branch.

III

For the reasons set forth both herein and in the dissent, this Court should grant certiorari so that it can uphold the subpoena power of the federal courts in the face of a claim by the executive branch that it has the power to, in effect, quash judicial subpoenas, and to resolve the issue of whether *vel non* the head of a federal agency may make a conclusive determination not to produce evidence sought by a federal court. Based on the facts of this case, and because that question was left unresolved by this Court in *U.S. ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), certiorari should be granted on this issue.

The Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In Re Recalcitrant Witness Richard Boeh,	No. 92-55096
Julia Gomez, et al, *Plaintiffs-Appellees,* v. Daryl Gates, et al, *Defendants,* and United States of America, *Respondent-Appellant.*	D.C. No. CV-90-856-JSL OPINION

Appeal from the United States District Court for the Central District of California J. Spencer Letts, District Judge, Presiding

Argued and Submitted
February 14, 1992* – San Francisco, California

Filed May 27, 1994

Before: William C. Canby, Jr., William A. Norris and Edward Leavy, Circuit Judges.

Opinion by Judge Canby; Dissent by Judge Norris

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* Argument in this case was conducted by telephone.

SUMMARY

Government Law/Government Employment/ Labor and Employment

The court of appeals reversed district court orders. The court held that a government agent could not be held in civil contempt for violating a court order to testify pursuant to a subpoena, where an agency regulation regarding the disclosure of agency information required the agent not to testify.

After members of the Los Angeles Police Department shot four robbery suspects, the surviving suspect and relatives of the deceased suspects brought a civil rights action against the police officers, the police chief, the City of Los Angeles and other officials, alleging excessive use of force. The plaintiffs caused a subpoena to be served on Richard Boeh, a Special Agent of the Federal Bureau of Investigation, who was the case agent for a criminal investigation of the shootings. The plaintiffs' purpose in serving the subpoena was to secure Boeh's testimony regarding evidence he had collected in his investigation, and his conclusions as to what had actually occurred at the scene of the shooting.

The United States Attorney referred the subpoena to the Department of Justice, pursuant to 28 C.F.R. § 16.22(a), which provides that in cases in which the government is not a party, no Department employee shall disclose information relating to or based upon material

contained in the Department's files, or disclose information acquired as part of the performance of his or her official duties, without prior approval of the proper Department official. The proper official in the Department denied permission for Boeh to testify, and directed him to decline to obey the subpoena.

The government filed a motion on Boeh's behalf to quash the subpoena. The district court ordered Boeh to appear *in camera* and answer questions that would permit the court to learn what Boeh knew about the alleged civil rights violations. Boeh refused to answer the court's questions, and the district court held him in civil contempt. The court denied the government's motion to quash, and ordered Boeh to testify pursuant to the subpoena. Boeh again refused, and was held in civil contempt. The government and Boeh appealed.

[1] Boeh could not be held in contempt for failing to comply with a court order if a valid regulation required him not to comply. Section 16.22(a) was valid insofar as it directed Boeh not to testify "without prior approval of the proper Department official."

[2] Section 16.22(a) was promulgated under the authority of the "housekeeping statute," 5 U.S.C. § 301, which provides that the head of an executive department may prescribe regulations for the conduct of employees, the performance of the agency's business, and the use of its records. [3] Section 16.22(a), as applied in this case, did not have the effect of violating the separation of powers by vesting an executive branch official with the judicial power to determine what evidence would be

admitted in a civil trial. The plaintiffs might have succeeded by other means in bringing the Attorney General or the designated "proper Department official" into court to contest his or her decision not to permit Boeh's testimony.

[4] Ninth Circuit authority compelled the rejection of any attempt at weighing the validity of the Attorney General's decision in the context of a contempt proceeding against his subordinate. [5] Prior Supreme Court and Ninth Circuit cases indicate that a challenge to the Attorney General's decision cannot be initiated by contempt orders against an agent who has been denied permission to testify.

[6] In the absence of a direct challenge to the Attorney General's decision to withhold permission and a ruling that permission was improperly withheld, Boeh could not be held in contempt for refusing to testify without permission, pursuant to § 16.22(a).

Circuit Judge Norris dissented, stating that § 301 provides no authority for agency heads to create a form of executive privilege to withhold evidence from the courts.

COUNSEL

Steven E. Zipperstein, Sean R. Berry and Mark D. Larsen, Assistant United States Attorneys, Los Angeles, California, for the respondent-appellant.

Stephen Yagman, Yagman & Yagman, Venice, California, for the plaintiffs-appellees.

OPINION

CANBY, Circuit Judge:

The United States and Richard Boeh,[1] and agent of the Federal Bureau of Investigation, appealed from the district court's denial of a motion to quash a subpoena *ad testificandum* and two civil contempt orders issued in response to Boeh's refusal to testify in a civil trial. The appeal was expedited pursuant to 28 U.S.C. § 1826(b). On February 18, 1992, we entered a brief order reversing all three orders of the district court, with Judge Norris indicating his dissent. Our order stated that opinions would follow; we now deliver them.

BACKGROUND

The underlying litigation arises out of an incident in which members of the Los Angeles Police Department shot four suspects, killing three of them and critically wounding the fourth, immediately after a robbery of a fast food restaurant in Sunland, California. The surviving

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[1] The United States, as a purported real-party-in-interest, filed the original notice of appeal in this case. Richard Boeh filed a motion to intervene in this court on February 4, 1992. The motion clearly manifests Boeh's intent to appeal from the district court's orders, and it was brought within the time permitted for filing of a notice of appeal. We therefore treat Boeh's motion as a notice of appeal. *See Rabin v. Cohen*, 570 F.2d 864, 866 (9th Cir. 1978). We direct the Clerk of this court to transmit the motion to the Clerk of the district court for filing as a notice of appeal with a filing date of February 4, 1992.

In light of Boeh's status as a party to this appeal, we need not address plaintiffs' arguments that the United States lacks standing to bring this appeal.

suspect and relatives of the deceased suspects brought a civil rights action in federal court against the police officers, Chief Daryl Gates, the City of Los Angeles, and various other officials, alleging the use of excessive force.

Shortly after the trial commenced, plaintiffs caused a subpoena to be served on Richard Boeh.[2] Boeh was a Special Agent of the FBI, and was the case agent for a criminal investigation of the shootings. Boeh had not been present at the incident; he was not a percipient witness to any events upon which the litigation was based. Neither Boeh nor the United States was a party to the litigation.

Plaintiffs' purpose in serving the subpoena was to secure Boeh's testimony regarding evidence he had collected in his investigation and his conclusions as to what had actually occurred at the scene of the shooting. The United states Attorney referred the subpoena to the Department of Justice, pursuant to 28 C.F.R. § 16.22(a)(1991), which provides:

> In any federal or state case or matter in which the United States is not a party, no employee . . . of the Department of Justice shall, in response to a demand, produce any material contained in the files of the Department, or disclose any information relating to or based upon material contained in the files of the Department, or disclose any information or produce any material acquired as part of the performance of that person's official duties or because

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[2] Service of the subpoena was accepted by the United States Attorney on behalf of Boeh.

> of that person's official status without prior approval of the proper Department official. . . .

The proper official in the Department denied permission for Boeh to testify, and directed Boeh to decline respectfully to obey the subpoena. The United States filed a motion on Boeh's behalf to quash the subpoena. Before hearing the motion to quash, the district court ordered Boeh to appear *in camera* and answer questions that would permit the court to learn what Boeh knew about the alleged civil rights violations and to determine, among other things, what limits should be placed on Boeh's testimony. Boeh refused to answer the court's questions and the district court held him in civil contempt. The district court then denied the United States' motion to quash and, in open court, ordered Boeh to testify pursuant to the subpoena. Boeh again refused and again was held in civil contempt. This appeal followed.

DISCUSSION

[1] Boeh may not be held in contempt for failing to comply with a court order if a valid regulation required him not to comply. *Ex Parte Sackett*, 74 F.2d 922, 923 (9th Cir. 1935); *Boron Oil Co. v. Downie*, 873 F.2d 67, 69 (4th Cir. 1989). We are convinced, both by statute and precedent, that 28 C.F.R. § 16.22(A) is valid insofar as it directs Boeh not to testify "without prior approval of the proper Department official." The question whether that prior approval was unlawfully withheld is not, we conclude, properly before us on this appeal from contempt rulings against Boeh.

[2] Section 16.22(a) was promulgated under the authority of the so-called "housekeeping statute," 5 U.S.C. § 301, which provides:

> The head of an Executive department . . . may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

The Department of Justice regulation here clearly falls within the terms of the first sentence of this statute: the regulation prescribes the conduct of employees, the performance of the agency's business, and the use of its records. Any doubt as to the validity of the regulation's requirement of prior approval is foreclosed in our view by the Supreme Court's decision in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 468 (1951), which upheld the validity of a predecessor to 28 C.F.R. § 16.22(A).

In *Touhy*, a Department of Justice employee was subpoenaed to produce departmental records in a habeas corpus proceeding. Pursuant to the then-existing regulation, the Attorney General withheld permission for the employee to comply with the subpoena, and the employee was held in contempt. The Supreme Court held that the employee could not be held in contempt because the regulation validly withdrew from the employee and placed in the Attorney General the decision whether and on what terms to comply with the subpoena. *Id.* at 467-69. In so holding, the Court relied on its earlier decision in

Boske v. Comingore, 177 U.S. 459, 467-69 (1900), upholding the right of the Secretary of the Treasury to withdraw from subordinates all discretion over the use and production of tax records. *Boske* overturned a state court's contempt order against a tax collector who refused to respond to a subpoena *duces tecum*. *See also Swett v Schenk*, 792 F.2d 1447, 1451 (9th Cir. 1986) (National Transportation Safety Board regulation restricting employee testimony); *Ex Parte Sackett*, 74 F.2d at 923-24 (similar Department of Justice regulation).

[3] Plaintiffs argue that section 16.22(a), as applied in this case, violates the separation of powers by vesting an executive branch official with the heretofore exclusively judicial power to determine what evidence will be admitted in a civil trial. We give no such effect to the regulation. We do not decide here that Boeh may never be required to testify or that section 16.22(a) establishes an absolute privilege. We conclude only that plaintiffs selected an improper method of attempting to compel Boeh's testimony. Plaintiffs might have succeeded by other means in bringing the Attorney General or the designated "proper Department official" into court to contest his or her decision not to permit Boeh's testimony.[3] Once properly before the appropriate court, the

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[3] Plaintiffs could have brought a separate action to challenge the Department's decision under the Administrative Procedure Act, 5 U.S.C. §§ 701-06. *See Davis Enterprises v. EPA*, 877 F.2d 1181, 1184-88 (3rd Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990); *appeal of the Sun Pipe Line Co.*, 831 F.2d 22, 24-26 (1st Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988); *see also Swett*, 792 F.2d at 1452 n.2 (suggesting that the proper method for challenging an agency's denial of permission is through a direct APA action).

Attorney General or designated official could have claimed whatever privileges might shield Boeh's testimony and the court could then have ruled on those assertions of privilege. *See Committee for Nuclear Responsibility, Inc. v. Seaborg,* 463 F.2d 788, 793 (DC Cir. 1971) (when the head of an agency challenges a subpoena, "the claim of privilege is one for consideration by the court"); *see also NLRB v. Capitol Fish Co.,* 294 F.2d 868, 873-74 (5th Cir. 1961) (when order is directed to head of the agency, *Touhy* and *Boske* are no longer relevant); *Reynolds v. United States,* 192 F.2d 987, 992-93 (3rd Cir. 1951) (same), *rev'd on other grounds,* 345 U.S. 1 (1953). We need not decide those issues because they are not before us.[4]

Plaintiffs may also have been able to bring a mandamus action against the Attorney General or his designee to require the granting of permission. *See* 28 U.S.C. § 1361. Such an attempt was unsuccessful in *Giza v. Secretary of HEW,* 628 F.2d 748 (1st Cir. 1980), but there the plaintiffs in a state proceeding were seeking federal mandamus to compel a federal employee to be deposed as an expert witness. The court held that mandamus would not lie because there was no duty on the part of the federal agency to supply expert testimony for plaintiffs' state court action. *Id.* at 751-52. These considerations would not preclude mandamus in a federal action to seek other than expert testimony. *See* Note, *Touhy and the Housekeeping Privilege: Dead but not Buried?,* 70 Tex. L. Rev. 685, 694 (1992).

[4] We therefore disagree with the dissenting opinion that this case presents the question left open in *Touhy*: "may the head of a federal agency make 'a *conclusive* determination' not to produce evidence sought by a federal court." *Infra* p. 5576 (emphasis added). On the contrary, we leave open the same question left open by *Touhy*. We do not rule on any question of executive privilege, and we certainly do not hold the Attorney General's withholding of permission "conclusive." *Touhy* held that a contempt proceeding against a subordinate who has been

Our conclusion here closely tracks the Supreme Court's decision in *Touhy*. After ruling that the Attorney General's regulation similar to section 16.22(a) had been validly promulgated under the predecessor statute to 5 U.S.C. § 301, the Court stated:

> We find it unnecessary, however, to consider the ultimate reach of the authority of the Attorney General to refuse to produce at a court's order the government papers in his possession, for the case as we understand it raises no question as to the power of the Attorney General himself to make such a refusal. The Attorney General was not before the trial court. It is true that his subordinate . . . acted in accordance with the Attorney General's instructions and a department order. But we limit our examination to what this record shows, to wit, a refusal by a subordinate of the Department of Justice to submit papers to the court in response to its subpoena *duces tecum* on the ground that the subordinate is prohibited from making such submission by his superior through Order No. 3229. *The validity of the superior's action is in issue only insofar as we must determine whether the Attorney General can validly withdraw from his subordinates the power to release department papers.*

340 U.S. at 467 (emphasis added) (footnote omitted). The Court thus rejected a separation of powers argument on

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denied permission to respond to a subpoena does not present the question whether the superior officer's denial of permission was valid. *Touhy*, 340 U.S. at 467. We decide the same.

the ground that it was not ruling on the Attorney General's power to refuse to produce the subpoenaed documents. *Id.* at 468-69. Justice Frankfurter emphasized this same point in his concurring opinion, describing the issue as "a matter of internal administration." *Id.* at 471. In accord with *Touhy*, we decline to reach the question of the Attorney General's power to refuse to provide evidence where the United States is not a party.[5]

[4] Indeed, we are compelled by our own circuit authority to reject any attempt at weighing the validity of the Attorney General's decision in the context of a contempt proceeding against his subordinate. In *Swett v. Schenk*, 792 F.2d at 1452, we upheld a district court's dismissal of a removed contempt proceeding against a subordinate federal official. We stated that we understood the appellant's frustration with the fact that the validity of the departmental decision, under its own regulations, had never been weighed and applied to his case. Nevertheless, we held that *Touhy* precluded the determination of such a question in a contempt proceeding:

> [T]he *Touhy* doctrine is jurisdictional and precludes a contempt action regardless of whether section 835.3(b) is ultimately determined to protect the requested testimony. Consequently, *a*

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[5] For the same reasons, we need not reach the question of the effect of the last sentence of 5 U.S.C. § 301: "This section does not authorize withholding information from the public or limiting the availability of records to the public." This sentence might affect the question whether the Attorney General can prevail in the assertion of privileges once he is properly brought before the appropriate court.

> *consideration of the merits can play no part in our decision.*

Id. (emphasis added) (footnote omitted). This ruling in *Swett* governs our application of *Touhy* to this case. *See also Ex Parte Sackett*, 74 F.2d at 923-24 (applying *Boske* and upholding Department of Justice regulation prohibiting investigating officer from testifying, despite assumed materiality of the records subpoenaed).[6]

[5] *Touhy* and the case upon which it relied, *Boske v. Comingore*, 177 U.S. 459 (1900), both dealt with subpoenas *duces tecum*, while this case involves a subpoena *ad testificandum*. There is no difference in principle, however, between the power of the Attorney General to specify what records a subordinate may release and the power to specify what information a subordinate may release through testimony. The Court acknowledged "the usefulness, indeed the necessity, of centralizing determination as to whether subpoenas *duces tecum* will be willingly

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[6] We have found only one case that, in the context of a motion to quash a subpoena against a subordinate officer, ruled upon the validity of the department's refusal to grant permission to testify. In *Moore v. Armour Pharmaceutical Co.*, 927 F.2d 1194 (11th Cir. 1991), a litigant appealed from a district court's grant of a motion to quash filed by the Department of Health and Human Services. In affirming the order quashing, the court of appeals applied APA standards and upheld the validity of the HHS' regulation against testimony by physicians of the Center for Disease Control, as applied to the case before it. *Id.* at 1197-98.

In all of the other cases that we have found applying the *Touhy* rule to preclude the enforcement of a subpoena against subordinate official, the agency's denial of permission was simply given effect. In addition to *Swett* and *Sackett* from this circuit, *see e.g.*, cases cited *infra*, p. 5567-68.

obeyed or challenged[.]" *Touhy*, 340 U.S. at 468. The same rationale justifies the Attorney General's power to determine whether privilege should be invoked for Boeh's testimony. The clear import of *Boske*, *Touhy*, and *Sackett* is that a challenge to the Attorney General's decision cannot be initiated by contempt orders against an agent who has been denied permission to testify.

[6] In *Swett*, we applied the *Touhy* principle to affirm the district court's dismissal of a contempt action against a National Transportation Safety Board investigator who had refused to testify in a state court tort action pursuant to a similar regulation. We held that the investigator could not be compelled to testify over the contrary command of the validly promulgated regulation. *Swett*, 792 F.2d at 1451-52 (citing 49 C.F.R. § 835.3(a)).[7] Numerous other courts have also applied the *Touhy* doctrine to subpoenas seeking testimony, rather than documentary evidence, from subordinate federal officials. *United States v. Bizzard*, 674 F.2d 1382, 1387 (11th Cir.), *cert. denied*, 459 U.S. 973 (1982); *Giza v. Secretary of Health Educ. & Welfare*, 628 F.2d 748, 751-52 (1st Cir. 1980); *United States v. Allen*, 554 F.2d 398, 406-07 (10th Cir.), *cert. denied*, 434 U.S. 836 (1977); *Giancana v. Johnson*, 335 F.2d 372,

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[7] The underlying litigation in *Swett* had been removed from state court; therefore, we could have rested our decision on either the Supremacy Clause, U.S. Const. art. VI, cl. 2, or sovereign immunity. We did not, however; we upheld the district court's dismissal of the contempt action on the basis of the *Touhy* doctrine without reference to the Supremacy Clause or sovereign immunity. *Swett*, 792 F.2d at 1451-52. For this reason, we do not find *Swett* to be readily distinguishable from our case, as the dissent urges.

375-76 (7th Cir. 1954); *Appeal of the United States Securities & Exchange Comm'n*, 226 F.2d 501, 516-20 (6th Cir. 1955); *Hotel Employees-Hotel Ass'n Pension Fund v. Timperio*, 622 F.Supp. 606, 607-08 (S.D. Fla. 1985); *Reynolds Metals Co. v. Crowther*, 572 F. Supp. 288, 290-91 (D. Mass. 1982); *Marcoux v. Mid-States Livestock*, 66 F.R.D. 573, 577-79 (W.D. Mo. 1975); *North Carolina v. Carr*, 264 F.Supp. 75, 78-80 (W.D.N.C. 1967), *appeal dism'd*, 386 F.2d 129 (4th Cir. 1967); *In re Mengel*, 201 F. Supp. 687, 689-90 (W.D. Pa. 1962); *see also Davis Enterprises*, 877 F.2d at 1184-88 (upholding EPA decision, challenged under APA, not to permit testimony of subordinate official); *Boron Oil* 873 F.2d at 69-72 (relying primarily on sovereign immunity and the Supremacy Clause). *Cf. Moore*, 927 F.2d at 1197-98 (upholding under APA standard a Health and Human Services Department decision to withhold a subordinate official's testimony; issue raised on motion to quash subpoena). We conclude that in the absence of a direct challenge to the Attorney General's decision to withhold permission and a ruling that permission was improperly withheld, Boeh cannot be held in contempt for refusing to testify without permission pursuant to 28 C.F.R. § 16.22(a)[8]

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[8] We emphasize that Boeh was not subpoenaed as a percipient witness to the events in issue in the civil trial. We need not address the questions of application or interpretation of section 16.22(a) that might be posed in such a case.

We also have no need to address here the substantial evidentiary questions that might be raised by plaintiffs' attempt to introduce the testimony of Boeh as a non-percipient witness. *See e.g.*, Fed. R. Evid. 701, 702, 802.

The district court attempted to draw a distinction between its order requiring Boeh to reveal the contents of his prospective testimony *in camera* and its order compelling Boeh's testimony in open court. For the purposes of the *Touhy* doctrine, we see no distinction.[9] Both orders are infirm. The district court cannot confer authority on Boeh to testify or reveal information *in camera* when the Attorney General has withdrawn that authority. Section 16.22(a) clearly reserves to the Attorney General or the properly designated official the authority to make the threshold determination whether to resist disclosure of official information in the hands of the Department. *Touhy's* point that the department head is entitled to enforce centralized decisionmaking applies without regard to the setting in which the information will be divulged.

Finally, we address briefly a point strongly urged by the dissent. The last sentence of the housekeeping statute provides: "This section does not authorize withholding information from the public or limiting the availability of records to the public." 5 U.S.C. § 301. This sentence was added in 1958, and the dissent cites legislative history indicating that the amendment was adopted in response to the executive's increasing use of the housekeeping statute as a source of executive privilege. *See* H.R. No. 1461, 85th Cong. 2d Sess. (1958), *reprinted in* 1958

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[9] In *Touhy*, the Supreme court observed that the subordinate employee had not been asked to submit the materials *in camera*, but that observation was of significance only because the regulation in *Touhy*, unlike section 16.22(a), authorized certain *in camera* disclosures. *See Touhy*, 340 U.S. at 466, 468.

U.S.C.C.A.N. 3352. That point is most certainly correct, but it does not address the question presented in this case or in *Touhy*: how is the validity of an assertion of executive privilege to be contested? *Touhy* held that it is *not* to be contested originally in a contempt proceeding against a subordinate who has been denied permission to respond to a subpoena. The House Report discussing the 1958 amendment is replete with statements that the housekeeping statute is not to be used as a source of executive privilege, but the report never states that the purpose of the amendment is to overrule *Touhy* and the amendment has never been so construed by courts. If the action of a department head is contested directly, as *Touhy* requires, then the 1958 amendment assures that the department head may not base an assertion of privilege on the housekeeping statute.

We understand the dissenting opinion's point that it may be more cumbersome to challenge as assertion of privilege by an APA suit or mandamus action, but *Touhy*, *Sackett* and *Swett* preclude litigants and courts from first pursuing the option of contempt proceedings against subordinate officials who have been denied permission to respond to a subpoena. We follow those cases, and go no further "for the case as we understand it raises no question as to the power of the Attorney General himself to make such a refusal." *Touhy*, 340 U.S. at 467.

CONCLUSION

The orders of the district court are

REVERSED.

NORRIS, J., dissenting:

This case presents the question whether an employee of a federal agency may lawfully refuse to obey a subpoena *ad testificandum* in reliance upon an agency regulation promulgated pursuant to the federal housekeeping statute, 5 U.S.C. § 301.

I

The plaintiffs in this civil rights action allege that officers of the Los Angeles Police Department used excessive force in fatally shooting three suspects and wounding a fourth following a robbery of a fast food restaurant. On the first day of trial, plaintiffs subpoenaed FBI agent Richard Boeh as a witness. The government moved to quash the subpoena primarily on the ground that Agent Boeh had not been authorized to testify as required by the Department of Justice's housekeeping regulation. Before ruling on the motion to quash, the district court ordered Boeh to appear *in camera* and answer questions that would enable the court to decide whether Agent Boeh should be required to testify, and if so, to what extent. When Boeh refused to answer any questions, the court denied the motion to quash and ordered Boeh to testify in open court. When Boeh again refused, the district court held him in contempt both for refusing to answer the court's questions *in camera* and for refusing to testify in open court. In denying the government's motion to quash, the district court said, "[t]he Justice Department has made a decision to put its own interests above the interests of justice in this case." January 23, 1992 Transcript at 14.

On appeal, the government seeks to reverse the contempt orders on the ground that the district court had no jurisdiction to hold Boeh in contempt because the Department of Justice's housekeeping regulation prohibited him from disclosing any information acquired in performing his official duties.[1] As the government puts it, "[t]he only question before this Court is whether the district court had jurisdiction to hold Agent Boeh in contempt." Appellant's Opening Brief at 8.

The government argues that the district court had no power to hold Agent Boeh in contempt as a recalcitrant witness because he was not authorized to testify under 28 C.F.R. § 16.22(a),[2] a regulation promulgated pursuant to

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[1] Before the district court the government also argued that Agent Boeh should not be required to testify because his testimony would have been inadmissible on a variety of evidentiary grounds. On appeal, the government does not rely upon these other points raised in its motion to quash. Nor could it. By refusing to answer even foundational questions by the court *in camera*, Agent Boeh provided no evidentiary basis for the court to decide questions such as whether Boeh's testimony would be inadmissible hearsay. Apparently the government expected the district court to rely on faith, not evidence, in quashing the subpoena on those grounds.

[2] The regulation says: "In any federal or state case or matter in which the United States is not a party, no employee . . . of the Department of Justice shall, in response to a demand, produce any material contained in the files of the Department, or disclose any information relating to or based upon material contained in the files of the Department, or disclose any information or produce any material acquired as part of the performance of that person's official duties or because of that person's official status without prior approval of the proper Department official. . . . "

the so-called "housekeeping statute," 5 U.S.C. § 301.[3] I believe § 301 provides no authority for agency heads to create a form of executive privilege to withhold evidence from the courts. The housekeeping statute was intended to give agency heads the authority to prescribe regulations for the administration of the agency, and nothing more. To interpret it as authorizing agencies to withhold evidence from federal courts not only goes far beyond the text and purpose of the statute, it raises a serious separation of powers question. As the Supreme Court has said, "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." *United States v. Reynolds*, 345 U.S. 1, 9-10 (1953). That is exactly the effect of the stand taken by the Attorney General in this case. If allowed to stand, today's decision "would upset the constitutional balance of 'a workable government' and gravely impair the role of the courts under Art. III." *United States v. Nixon*, 418 U.S. 683, 707 (1974).

II

A

The government relies principally on *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), in support of its contention that § 301 authorized the Attorney General's

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[3] The statute reads in its entirety: "The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public."

actions. *Touhy*, however, does not control this case. The question addressed in *Touhy* was whether a Justice Department official could refuse to obey a subpoena *duces tecum* ordering the production of agency papers in his possession. In refusing to obey, the subordinate official relied upon a Justice Department regulation that barred employees from producing records unless they had express authority to do so. In resolving the issue, the Court distinguished between a far-reaching question, (1) "whether it is permissible for the Attorney General to make a conclusive determination not to produce records," and a narrow one, (2) "whether his subordinates in accordance with the order may lawfully decline to produce them in response to a subpoena *duces tecum.*" *Id.* at 467.

The Court considered only the narrow question, holding that an agency head could withhold from subordinates the authority to produce documents in response to a subpoena *duces tecum*. The Court declined to reach the far-reaching question:

> We find it unnecessary, however, to consider the ultimate reach of the authority of the Attorney General to refuse to produce at a court's order the government papers in his possession, for the case as we understand it raises no question as to the power of the Attorney General to himself make such a refusal. The Attorney General was not before the trial court.

Id.

Thus *Touhy* did not hold that the Attorney General can arrogate to himself the authority to override the subpoena power of Article III courts by withholding evidence within his administrative control. *Touhy* instead

held that the Attorney General may, "as a matter of internal administration," *Touhy*, 340 U.S. at 471 (Frankfurter, J., concurring), promulgate regulations under the housekeeping statute designating which agency personnel are authorized to produce agency records. If an agency head withholds from subordinates authority to produce documents that have been subpoenaed, as the Attorney General did in *Touhy*, the agency head *himself* may still be subpoenaed. Because *Touhy* left undecided the question whether the Attorney General himself could lawfully refuse to obey a court order to produce the documents, *Touhy*, 340 U.S. at 467, *see also id.* at 472 (Frankfurter, J., concurring), it left intact the judicial power to subpoena evidence, whether documentary or testimonial, that the courts determine is needed to decide cases. Just as *Touhy* did not decide whether "it is permissible for the Attorney General to make a conclusive determination not to produce records," *id.* at 467, it did not decide whether the Attorney General could make a conclusive determination not to allow the testimony of a subordinate.

In this case, the Attorney General made just such a conclusive determination, thereby presenting us with the far-reaching question not decided in *Touhy*. To understand why this case presents the question left unanswered in *Touhy* requires a review of the difference between a subpoena *duces tecum* and a subpoena *ad testificandum* – the difference, if you will, between documentary evidence and live testimony. The ability to produce documents in response to a subpoena *duces tecum* is impersonal. It is, as Justice Frankfurter said, a mater of "internal administration" as to who is authorized by an

agency head to produce documents. Which agency employees may produce documents is a matter suitable for treatment in agency regulations promulgated pursuant to the "housekeeping" statute. Because the head of an agency cannot divest herself of the authority to control internal documents, she always had the ability to herself comply with a subpoena *duces tecum* served upon *her*. Her personal knowledge of the contents of the documents is irrelevant; all that matters is that they are within her control.

In contrast, the ability to produce testimony is personal. Because the testimony must be based upon the witness' personal knowledge, it can only be produced by the witness himself. Only Agent Boeh can comply with the subpoena *ad testificandum* at issue here. Moreover, nobody other than Agent Boeh himself may be subpoenaed to produce Agent Boeh's testimony. Not even the Attorney General herself can be subpoenaed for that purpose. The Federal Rules of Civil and Criminal Procedure recognize this reality, and make clear that a subpoena may issue only for the testimony of the "person to whom it is directed." Fed. R. Civ. P. 45(a)(1)(C); Fed. R. Crim. P. 17(a). This is not a subpoena *duces tecum* case. The Attorney General cannot produce Agent Boeh's testimony as though it were a document. When the subpoena is *ad testificandum*, there can be no pinch hitters. The Attorney General has the authority to control the production of agency documents, but the Attorney General has no power to compel a subordinate to obey a subpoena *ad testificandum*. The most the Attorney General can do is discipline him for insubordination if he refuses to testify. *But the Attorney General cannot use the ultimate weapon of*

contempt to enforce the subpoena; he cannot put Agent Boeh in jail for refusing to testify. Because an agency head cannot produce a subordinate's testimony the way he can produce agency documents, the far-reaching question left open in *Touhy* is squarely presented by the Attorney General's refusal to authorize Agent Boeh to testify: may the head of a federal agency make "a conclusive determination" not to produce evidence sought by a federal court?[4]

B

Just as *Touhy* does not control this case, nor do the other cases cited by the government. Most, like *Touhy*,

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[4] The majority maintains that it does not reach the question left open in *Touhy* because its holding is limited to the conclusion that "plaintiffs selected an improper method of attempting to compel Boeh's testimony." Opinion at 5564. *See also* Opinion at 5565 n.4. According to the majority, Gomez has available to him alternative means of obtaining Boeh's testimony, either by filing a mandamus action against the Attorney General or by filing suit under the Administrative Procedure Act (APA) seeking a declaratory judgment invalidating the application of the housekeeping regulation. *See* Opinion at 5564 n.3.

Neither route is an acceptable substitute to the time-honored means of obtaining a witness's testimony by serving him with a subpoena *ad testificandum*, backed up by the court's power of contempt. If Gomez had a right to Boeh's testimony, he had a right to obtain it when he needed it, which in this case was immediately, while the trial was still going on. Forcing Gomez to file a separate mandamus action or a cumbersome APA suit in the middle of his civil rights trial is so burdensome that it effectively eviscerates his right to obtain Boeh's testimony.

involve subpoenas *duces tecum*.[5] The rest are inapposite for they involve the power of *state* courts to subpoena federal officials. Our decisions in *Swett v. Schenk*, 792 F.2d 1447 (9th Cir. 1986), falls in this category.[6] *Swett* involved a California Superior Court's subpoena of a National Transportation Safety Board investigator. The state court's subsequent contempt action was removed to district court and dismissed. We held that "the *state court* lacked jurisdiction to use contempt procedures against [the investigator]." 792 F.2d at 1451 (emphasis added). If the state court lacked the power to subpoena federal officials and to cite them for contempt, then so did the

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[5] *Boske v. Comingore*, 177 U.S. 459 (1900), is also a document production case, which held that the Secretary of the Treasury "may take from a subordinate . . . all discretion as to permitting the records in his custody to be used for any other purpose than the collection of revenue and reserve for his own determination all matters of that character." *Id.* at 470. As Justice Frankfurter noted, "[t]here is not a hint in the *Boske* opinion that the Government can shut off an appropriate judicial demand for such papers." *Touhy*, 340 U.S. at 472. Other cases cited by the government are also document production cases and rest on the narrow holdings of *Touhy* and *Boske*. *See Ex Parte Sackett*, 74 F.2d 922 (9th Cir. 1935); *Saunders v. Great Western Sugar Co.*, 396 F.2d 794 (10th Cir. 1968); *Smith v. C.R.C. Builders Co.*, 626 F. Supp. 12 (D. Colo. 1983). In *Sackett*, we explicitly noted that "[w]hether or not the Attorney General could be compelled to produce such records in response to a subpoena or to testify concerning them is a matter which is not involved [in this case]." 74 F.2d at 924.

[6] *See also Boron Oil Co. v. Downie*, 873 F.2d 67, 70-71 (4th Cir. 1989); *Reynolds Metals Co. v. Crowther*, 572 F.Supp. 288, 291 (D. Mass. 1982) ("[I]t is unnecessary to determine under what circumstances a federal court could compel a federal employee to give testimony contrary to instructions from the head of a department.").

district court, because "removal jurisdiction is derivative [and] the district court acquired no jurisdiction on removal." *Id.* The limitations on a state court's subpoena and contempt powers stem from the sovereign immunity of the United States and from the Supremacy Clause. *Boron Oil Co. v. Downie*, 873 F.2d 67, 71 (4th Cir. 1989). Such limitations do not apply when a *federal* court exercises its subpoena powers against federal officials. Because the instant case involves a federal court subpoena, *Swett* is inapposite.

In sum, because neither *Touhy* nor *Swett* nor any other case is controlling authority, we are not barred by stare decisis from deciding the question presented here.

III

I now turn to the heart of the matter: does the housekeeping statute in fact authorize agency heads to adopt an executive privilege immunizing subordinates from the subpoena power of Article III courts? Consider first the text of the statute. *Hughey v. United States*, 495 U.S. 411, 415 (1990) ("As in all cases involving statutory interpretation, we look first to the language of the statute itself."). Says Congress,

> The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. *This section does not authorize withholding information from the public or limiting the availability of records to the public.*

5 U.S.C. § 301 (emphasis added). True to its purpose as a housekeeping statute, the text does nothing more than give agency heads the authority they need to govern their agencies: to regulate employees, manage agency business, and control agency papers and property. Painted in broad strokes, the statute contemplates great executive discretion. But that discretion is not unbounded, for it is explicitly restricted in a critical respect: "This section does not authorize withholding information from the public or limiting the availability of records to the public." Withholding information from the public is, of course, precisely what the Attorney General is trying to do in this case. Here, by refusing to authorize Agent Boeh to respond to the court's subpoena, the Attorney General has tried to deny plaintiff Gomez, a member of the public, access to the information that only Agent Boeh can provide – his personal knowledge of matters relevant to Gomez' civil rights action. The text of the housekeeping statute thus expressly forbids an agency head from doing what the Attorney General is trying to do here. The statute cannot be read as authorizing agency heads to adopt regulations creating an executive privilege not to testify. It cannot be read as supporting the government's argument that an agency head can, by not authorizing a subordinate to testify, strip the district court of Article III power to enforce its subpoena.

The legislative history of § 301 reinforces this reading of the text. *See Conroy v. Aniskoff* 113 S.Ct. 1562, 1566 (1993) (examining legislative history even in case where text is unambiguous and unequivocal). The original version of the housekeeping statute did not include the statement that the statute does not authorize withholding

information from the public. That sentence was added in 1958. The House report accompanying the amendment explained in some detail that the proposed amendment was a response to the executive's increasing use of the housekeeping statute as a basis for withholding information from the public. H.R. No. 1461 (85th Cong. 2d Sess. (1958), *reprinted in* 1958 U.S.C.C.A.N. 3352. According to the House report, the original housekeeping statute was only intended to "help General Washington get his administration underway by spelling out the authority for executive officials to set up offices and file Government documents." *Id.* at 3352. Over time, however, agencies began citing the statute as authority for their decision to withhold information from the public, particularly litigants and the press. *Id.* Congress opposed this use of the statute, instead thinking that executive privileges must be based on specific congressional authorization after a congressional determination that a particular area of information must be closed to the public. *Id.* According to Congress, the housekeeping statute had "become a convenient blanket to hide anything Congress may have neglected or refused to include under specific secrecy laws." *Id.* at 3353. This result, said the report, "would have aroused Madison, Jefferson, Mason and the rest of the statesmen who put so much trust in popular rights to information." *Id.* (quoting congressional witness' testimony). In sum, says the report, "concealment has been the result of the application" of the housekeeping statute, and "the purpose of this bill is to correct that situation." *Id.* While I am cognizant of the criticism that legislative history is frequently indeterminate, *Conroy*, 113 S.Ct. at 1567 (Scalia J., concurring), this is not such a case. Here,

the legislative history is as crystal clear as the text of the statute itself: both compel the conclusion that § 301 does not support the government's claim that an agency head may withhold testimony from a court at its discretion.[7]

I note in closing that my reading of § 301 does not prevent an agency head from asserting various privileges. To the contrary, this appeal would probably have been unnecessary had the government allowed Boeh to testify *in camera* and then interposed objections or claims of privilege on a question-by-question basis, giving the district court the opportunity to rule whether the witness should be compelled to provide specific testimony. Just such an approach was suggested by the district court in response to the government's claim that if Agent Boeh

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[7] Every commentator that I am aware of shares this reading of § 301. *See* Note, *Touhy and the Housekeeping Privilege: Dead but not Buried?*, 70 Tex. L. Rev. 685, 689 (1992) (the proposition that "a government agency may withhold documents or testimony at its discretion [ ] simply is not good law and hasn't been since 1958."); Note, *Every Man's Evidence and the Ivory Tower Agencies: How May a Civil Litigant Obtain Testimony From an Employee of a Nonparty Federal Agency?*, 59 Geo. Wash. L. Rev. 1647, 1656 (1991) (after the 1958 amendment "the Housekeeping Statute does *not* authorize nondisclosure regulations") (emphasis in original); Gerald Wetlaufer, *Justifying Secrecy: An Objection the General Deliberative Privilege*, 65 Ind. L.J. 845, 869 (1990) ("By this Act, Congress eliminated any broad privilege-in-effect that might have been approved by Justice Reed's decision in *Touhy*."); Don Lively, *Government Housekeeping Authority: Bureaucratic Privileges Without a Bureaucratic Privilege*, 16 Harv. C.R.-C.L.L. Rev. 495, 500 (1981) ("As the legislative history accompanying the 1958 amendment to the housekeeping statute shows, Congress intended that the statute itself should not double as a form of privilege.").

testified he would be forced to violate the secrecy of the grand jury and disclose the identity of a confidential informant. Said the district court, "I made it crystal clear to you that you can stand there right next to [Agent Boeh] if he wants to claim the . . . privilege, and every time there's a specific question asked, if you think it would violate any of the specific prohibitions, you have only to tell me. It's easy enough, but you haven't done that." January 30, 1992 Transcript at 14. Instead of allowing the court to hear Boeh's testimony and rule on whether it was privileged, the government simply made the blanket assertion that § 16.22(a) deprived the district court of "jurisdiction" to enforce its subpoena. This the government cannot do. While the government retains its authority to assert various privileges, it cannot, as it tried to do here, fashion additional privileges out of the cloth of the housekeeping statute.

IV

The government's attempt to deprive the district court of its Article III authority to subpoena Agent Boeh violates the fundamental principle that "the public . . . has a right to every man's evidence." *United States v. Bryan*, 339 U.S. 323, 331 (1950) (quoting Wigmore, *Evidence* § 2192 (3d ed.)). Exceptions "to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for the truth." *Nixon*, 418 U.S. at 710. As an encroachment on the Article III judicial power, the exception claimed by the Attorney General here raises serious separation of powers questions. *See id.* at 707 (unqualified privilege conflicts with function of the courts under Article III).

Even assuming Congress has the authority to grant such power to the executive, we should not impute such an intent to Congress unless it is clearly expressed. Here, Congress has not only declined to express such intent, it has, in both the text and legislative history of the statute, clearly expressed a contrary intent.

In sum, the housekeeping statute does not authorize agency heads to create a form of executive privilege that immunizes subordinates from the reach of an Article III court's power to issue subpoenas *ad testificandum*. Accordingly, I would affirm the district court's orders denying the motion to quash and holding Agent Boeh in contempt of court.

APPENDIX B

Julia GOMEZ, et al., Plaintiffs,

v.

Daryl GATES, et al., Defendants.

No. CV 90-0856 JSL (Sx).

United States District Court,
C.D. California

July 31, 1992.

Stephen Yagman, Yagman & Yagman, Venice, Cal., for plaintiffs.

Don Vincent, Asst. City Atty., Los Angeles, Cal., for Defendants.

ORDER GRANTING PLAINTIFFS' MOTION FOR ATTORNEY'S FEES

LETTS, District Judge.

The Motion of plaintiffs JULIA GOMEZ, et al. for attorney's fees pursuant to 42 U.S.C. s 1988 came on for hearing regularly on May 11, 1992.

Having reviewed the papers filed in connection with this matter and being fully apprised of the relevant facts and law, the court finds as follows.

I. Facts

This case arose from a shooting by police officers during a robbery of a McDonald's restaurant in Sunland, California on February 12, 1990. The case was tried to a

jury beginning on January 7, 1992, and the jury rendered special verdicts in favor of the plaintiffs against all defendants remaining at the time of trial,[1] except the City of Los Angeles, on March 30, 1992. Because the court's analysis depends in part on the peculiar characteristics of the case, a brief discussion of the evidence follows.

The officers involved in the shooting were members of the Los Angeles Police Department's ("LAPD") Special Investigation Section ("SIS"). They had the robbers under surveillance as suspects in prior McDonald's armed robberies for several weeks. The evidence strongly suggested that several of these robbers had in fact taken part in the earlier robberies.

There was evidence from which the jury could have concluded that the officers deliberately allowed the Sunland McDonald's robbery to occur before attempting to arrest the robbers. There was also evidence that this sequence was consistent with the general practice of the SIS. It was undisputed that the SIS officers notified the police dispatcher not to send further officers in response to the store manager's 911 call, because the SIS unit was already on the scene.

The plaintiffs' theory of the case was that the SIS officers had deliberately created a situation in which deadly force would be necessary, but apparently justifiable as self-defense. The evidence indicated that in fact the robbers were "armed" with inoperable pellet guns believed by the officers to be real guns. The evidence

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[1] The court granted directed verdicts in favor of certain other defendants before trial.

further showed that after first "jamming"[2] the vehicle in which the robbers were attempting their getaway, the officers fired into the car approximately twenty shotgun rounds, of which a large number struck the robbers. The evidence also showed that after this initial barrage, one of the robbers, Burgos, was shot and killed while fleeing the scene. The officers' testimony, which the jury apparently did not believe, was that Burgos, after being shot once and while falling to the ground, leveled his pellet gun at them as if preparing to shoot. Another officer shot a second robber, who was already fatally or near-fatally wounded, through the top of the head from a distance of two feet. The same officer then shot plaintiff Olivas, the only robber to survive, in the stomach from a distance of about a foot and a half. Another officer who had approached the car then shot the fourth robber, who also was already fatally or near fatally wounded, from approximately the same distance

Based upon this and other evidence, the jury held liable all of the officers who fired shots and former Police Chief Daryl Gates.[3] The jury awarded no compensatory damages. It did, nonetheless, award a total of $44,000 in punitive damages to Olivas and the survivors of the three dead men.

The trial of this case spanned thirteen weeks. It presented numerous complex questions of fact and law,

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[2] "Jamming" means boxing in a suspect's car with police cars.

[3] Gates was called as a witness and testified extensively about his knowledge of SIS practices, and about his policies regarding excessive force.

including whether and how the Report of the Independent Commission on the Los Angeles Police Department (the "Christopher Commission Report") could be used as evidence, a matter of first impression; whether the chairman of the Commission could be called as a witness; and whether an FBI agent could be called to testify as to matters learned during a criminal investigation of the incident. The subpoena of the FBI agent caused an interlocutory appeal which interrupted the trial for four weeks.

After the jury verdict was entered, plaintiffs' counsel filed the fee motion at issue. Between the hearing on this motion and the court's disposition of it, the Supreme Court announced its decision in City of Burlington v. Dague, ___ U.S. ___, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992). Having reviewed the prior law, and formulated a tentative decision in light of that law, this court is now required to determine the extent, if any, to which Dague requires a different analysis and decision.

II. The Law Before Dague

In Dague, the Supreme Court addressed many of the apparent anomalies in earlier decisions regarding fee awards under Section 1988 and other fee- shifting statutes.[4] In doing so, however, it was not required to answer a number of questions which must be addressed here.

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[4] Dague involved an award of attorneys' fees under s 7002(e) of the Solid Waste Disposal Act, 90 Stat. 2795, 2826, as amended, 42 U.S.C. s 6972(e), and s 505(d) of the Federal Water Pollution Control Act (Clean Water Act), 86 Stat. 816, 889, as amended, 33 U.S.C. s 1365(d). The Court stated that its decision was not limited to these particular fee-shifting statutes, however. Quoting from one of the statutes, the Court said: This

Before Dague, the principal Supreme Court decisions which required consideration were Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), Blum v. Stenson, 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984), City of Riverside v. Rivera, 477 U.S. 561, 106 S.Ct. 2686, 91 L.Ed.2d 466 (1986), and Pennsylvania, et al. v. Delaware Valley Citizens' Council for Clean Air ("Delaware Valley II"), 483 U.S. 711, 107 S.Ct. 3078, 97 L.Ed.2d 585 (1987). The principal Ninth Circuit cases which required consideration in light of the Supreme Court decisions were Fadhl v. City and County of San Francisco, 859 F.2d 649 (9th Cir.1988), Cabrales v. County of Los Angeles, 864 F.2d 1454 (9th Cir.1988), D'Emanuele v. Montgomery Ward & Co., Inc., 904 F.2d 1379 (9th Cir.1990)[5], Corder v. Gates, 947 F.2d 374 (9th Cir.1991), and Bernardi v. Yeutter, 951 F.2d 971 (9th Cir.1991).[6]

The thrust of these pre-Dague cases was as follows. Before Hensley, the cases suggested that a "reasonable" attorney's fee award was to be determined by reference

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language is similar to that of many other federal fee-shifting statutes, see e.g., 42 U.S.C. ss 1988, 2000(e)-5(k), 7604(d); our case law construing what is a "reasonable" fee applies uniformly to all of them. Flight Attendants v. Zipes, 491 U.S. 754, 758 n. 2, 109 S.Ct. 2732, 2735 n. 2, 105 L.Ed.2d 639 (1989). ___ U.S. at __, 112 S.Ct. at 2641.

[5] D'Emanuele involved an award of attorneys' fees in an action under ERISA, not a civil rights statute. Nevertheless, the Ninth Circuit stated, "[W]e expressly hold that the lodestar/multiplier factors [approved by the Supreme Court in Hensley, a Section 1988 case] should be considered in determining the amount to be awarded in an ERISA case." 904 F.2d at 1383.

[6] The court also considered Chalmers v. City of Los Angeles, 676 F.Supp. 1515 (C.D.Cal.1987).

to the so-called "Johnson factors," from Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir.1974). These factors were referred to in the Senate Report on the Civil Rights Attorney's Fees Award Act of 1976 (the statute enacting Section 1988), S.Rep. No. 94-1011 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, and the Ninth Circuit adopted them in Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir.1975), cert. denied, 425 U.S. 951, 96 S.Ct. 1726, 48 L.Ed.2d 195 (1976). The Johnson factors are: (1) The time and labor required . . . (2) The novelty and difficulty of the questions . . . (3) The skill requisite to perform the legal service properly . . . (4) The preclusion of other employment by the attorney due to acceptance of the case . . . (5) The customary fee . . . (6) Whether the fee is fixed or contingent . . . (7) Time limitation imposed by the client or the circumstances . . . (8) The amount involved and the results obtained . . . (9) The experience, reputation, and ability of the attorneys . . . (10) The "undesirability" of the case . . . (11) The nature and length of the professional relationship with the client . . . (12) Awards in similar cases. Johnson, 488 F.2d at 717-19

At the time Section 1988 was adopted, however, another method of calculating "reasonable fees" coexisted with the Johnson factors analysis. That other method was simply multiplying the number of hours reasonably expended on the matter by a reasonable hourly rate. The product of that multiplication has come to be known as the "lodestar."

In Hensley v. Eckerhart, the Supreme Court attempted to reconcile the two strands of analysis, holding that the lodestar is "[t]he most useful starting point

for determining the amount of a reasonable fee." Hensley, 461 U.S. at 433, 103 S.Ct. at 1939. Hensley noted, however, that "[t]he district court also may consider other factors identified in Johnson [citation omitted], though it should note that many of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate." 461 U.S. at 434, n. 9, 103 S.Ct. at 1940 (emphasis added).

In Blum v. Stenson, the Supreme Court went a step further, and said that "the 'product of reasonable hours times a reasonable rate' normally provides a 'reasonable' attorney's fee within the meaning of the statute." Blum, 465 U.S. at 897, 104 S.Ct. at 1548 (citing Hensley). The Blum Court then identified some of the specific Johnson factors which it deemed necessarily subsumed within the lodestar, and others which are normally, but not necessarily, subsumed.[7] The Court expressly chose not to address whether the "risk of not being the prevailing party" – i.e., the contingent nature of the attorneys' fees – was subsumed. 465 U.S. at 901 n. 17, 104 S.Ct. at 1550 n. 17.

After Blum, the relevant cases have focused upon when, if ever, a "multiplier" – a number by which the lodestar would be multiplied to determine the final fee – would be justified to compensate the prevailing attorney for taking the case on a contingent basis.

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[7] The "novelty and complexity of the issues" was of the former type; the "quality of representation" and "results obtained" were in the latter category.

The decision of the multiplier issue required the Court to resolve the tensions among three basic themes which had run consistently through its decisions on statutory attorney's fees. The first theme was that " 'a plaintiff who obtains relief in a civil rights lawsuit "does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest importance." ' " City of Riverside v. Rivera, 477 U.S. 561, 575, 106 S.Ct. 2686, 2694, 91 L.Ed.2d 466 (1986) (quoting H.R.Rep. No. 94-1558, p. 2 (1976) (quoting Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968))). The second such theme was that counsel are to be compensated only for claims successfully prosecuted. Hensley, 461 U.S. at 424, 103 S.Ct. at 1933. The third consistent theme was that both elements of the lodestar – reasonable hours and reasonable rate – were to be determined by reference to what is reasonable in the commercial market.

The conventional wisdom is that plaintiffs' lawyers who work on the basis of contingency must earn an hourly rate equal to some multiple of that charged by civil rights defense lawyers, because the defense lawyers are paid in all cases, while the plaintiffs' lawyers are paid only in the cases they win. Although this analysis is conventional, it is by no means free from doubt. See infra.

Following the conventional wisdom, however, courts have reasoned that prevailing plaintiffs' counsel in fee shifting cases must be paid a multiplier in order to attract competent lawyers to prosecute civil rights claims against defense lawyers who are paid by the hour. This analysis was rejected in the principal opinion in Delaware Valley II. Justice White, joined by Justices Rehnquist, Powell and

Scalia, stated that "multipliers or other enhancement of a reasonable lodestar fee to compensate for assuming the risk of loss is [sic] impermissible under the usual fee-shifting statutes." 483 U.S. at 727, 107 S.Ct. at 3088. Justice O'Connor, agreeing with these four that a multiplier should not be awarded in the case at bar, nevertheless opined that a multiplier might be appropriate in another case if it were based on the market treatment of contingent fee cases as a class, and if the fee applicant could establish that without a multiplier, the prevailing party would have faced substantial difficulty in finding counsel in the relevant market. 483 U.S. at 731-34, 107 S.Ct. at 3090-91. The Ninth Circuit concluded that Justice O'Connor's opinion became the law, but the Second Circuit disagreed. Compare Fadhl v. City and County of San Francisco, 859 F.2d 649, 650 n. 1 (9th Cir.1988), with Dague v. City of Burlington, 935 F.2d 1343, 1360 (2d Cir.1991), rev'd, City of Burlington v. Dague, ___ U.S. ___, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992) (citations omitted).[8]

Justice White's opinion in Delaware Valley II did not clearly address the prevailing wisdom – that without

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[8] In Fadhl the Ninth Circuit stated: "Justice O'Connor's concurring opinion constitutes the Court's holding in the case. Save Our Cumberland Mountains, Inc. v. Hodel, 826 F.2d 43, 53 n. 6 (D.C.Cir.1987); Blum v. Witco Chemical Corp., 829 F.2d 367, 379 & n. 11 (3rd Cir.1987); Spell v. McDaniel, 824 F.2d 1380, 1404 & n. 23 (4th Cir.1987); Crumbaker v. Merit Systems Protection Board, 827 F.2d 761, 761 (Fed.Cir.1987)." In contrast, the Second Circuit stated in Dague: "Given the outcome in Delaware Valley II, we do not view any one of the three separate opinions dispositive on the issue before us today. While some courts view Justice O'Connor's concurring opinion as being the controlling law . . . we disagree."

multipliers it would be impossible to attract competent lawyers to take civil rights cases. The issue remained open, therefore, whether a multiplier would be justified if the evidence showed that in the particular market, a multiplier was necessary to attract lawyers to that class of cases. The Ninth Circuit decided that issue in the affirmative in Fadhl; the Second Circuit decided it in the negative in Dague.

III. Dague: Questions Answered and Left Unanswered

A. An Analysis of Dague

In its Dague opinion, the Supreme Court definitively foreclosed district court consideration of whether the fee was contingent or fixed as a factor in setting attorney's fees under fee-shifting statutes. The Court began its analysis by pointing out that the risk of loss in a particular case "is the product of two factors: (1) the legal and factual merits of the claim, and (2) the difficulty of establishing those merits." ___ U.S. at ___, 112 S.Ct. at 2641. The Court skipped lightly over the second factor, saying only that it is "ordinarily reflected in the lodestar – either in the higher number of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced enough to do so." Id.

The Court then observed, "The first factor (relative merits of the claim) is not reflected in the lodestar, but there are good reasons why it should play no part in the calculation of the award." Id. To do so, the Court reasoned, "would encourage meritorious claims to be brought, but only at the social cost of indiscriminately encouraging nonmeritorious claims to be brought as

well." Id. The Court then revisited the rationale advanced by Justice O'Connor in Delaware Valley II, allowing a multiplier if the party seeking enhancement could "establish that without an adjustment for risk, the plaintiff would have faced substantial difficulties finding counsel in the local or other relevant market." *Id.* ___ U.S. at ___, 112 S.Ct. at 2641 (quoting Delaware Valley II). The Court rejected this rationale, finding the most likely reason a plaintiff could have difficulty finding counsel to be the riskiness of the particular case, a factor Justice O'Connor and the four justices with whom she concurred had rejected as a basis for enhancement. Id ___ U.S. at ___, 112 S.Ct. at 2641.

The Court further found unpersuasive Justice O'Connor's theory that the market treats contingent fee cases differently "as a class," because "for a very large proportion of contingency-fee cases – those seeking not monetary damages but injunctive or other equitable relief – there is no 'market treatment.' " Id. The Court also noted: Contingency enhancement calculated on any class-wide basis . . . guarantees at best . . . that those cases within the class that have the class-average chance of success will be compensated according to what the 'market' requires to produce the services, and that all cases having above-class average chance of success will be overcompensated. Id. (emphases in original).

The Court concluded its analysis by pointing out that the trend in its decisions had been " 'away from the contingent-fee model,' " id. (quoting Venegas v. Mitchell, 495 U.S. 82, 87, 110 S.Ct. 1679, 1682, 109 L.Ed.2d 74 (1990)), and by invoking its oft-repeated objective that the

determination of legal fees " 'should not result in a second major litigation' " Id. (quoting Hensley, 461 U.S. at 437, 103 S.Ct. at 1941).

Dague appears to be entirely consistent with the prior case law, and it comports entirely with common experience. This court has no experience consistent with the prevailing wisdom that lawyers who regularly accept engagement on a contingency basis do so in the expectation that they will have to earn some multiple of the prevailing hourly rate in the cases they win, in order to be compensated for the cases they lose. On the contrary, it seems clear that successful contingent fee lawyers assess most cases with the knowledge that they will almost surely settle. Such lawyers expect that the settlement will be high enough for the contingent fee earned to yield a reasonable hourly rate for the time expended. There is every reason to believe, in fact, that most successful contingent fee lawyers could and would remain in the market simply to earn the income they receive from settled cases, even if on average they were grossly undercompensated for the cases which went to trial. For this reason, in addition to those stated in Dague, it seems appropriate to conclude that the lodestar need not be enhanced by a multiplier to attract lawyers to meritorious cases simply because they were taken on an [sic] contingent fee basis.

The question remains, however, whether there remains any class of cases in which enhancement of the lodestar might still be appropriate. Dague did not actually hold that the lodestar is always the beginning and end of the calculation of "reasonable" fees. Nor did the Court expressly reject the Johnson factors, as such; it

merely added contingency of fee as another Johnson factor which is necessarily subsumed in the lodestar. This court must now consider whether Dague precluded consideration of another Johnson factor which it did not mention, and thus did not similarly declare to be subsumed in the lodestar.

B. "Undesirable Cases": An Exception to Dague

Specifically, Dague did not address whether the "undesirability of the case," a Johnson factor, may be a basis for enhancing a fee otherwise determined by a simple lodestar calculation. Of course, the factor most likely to make a case "undesirable" is a low likelihood of prevailing at trial. It might seem, therefore, that Dague would lead inevitably to the conclusion that the undesirability of the case is not to be considered apart from the lodestar. Nevertheless, in this court's view, Dague left room to consider enhancement of the lodestar to reflect the undesirability of particular cases. "Undesirable cases" for this purpose are those in which the plaintiff is unlikely to prevail for reasons having nothing to do with the merits of the claim or the quality of the attorney's performance.

There can be no argument with the Supreme Court's general statement in Dague that "the difficulty of establishing [the] merits . . . is ordinarily reflected in the lodestar – either in the higher number of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced enough to do so." Id. ___ U.S. at ___, 112 S.Ct. at 2641. In most cases, the difficulty of establishing the merits of a claim turns upon

the relative complexity of the issues. In turn, the effectiveness of an attorney in dealing with complex issues depends upon the attorney's skill, and the amount of time spent on the matter.

This analysis applies to most civil rights cases, because they are not qualitatively different from other lawsuits. Most civil rights cases involve legitimate disputes between parties who, in good faith, see the same events differently. The likelihood of success on the merits is determined by the same factors as in all other cases; the only difference is that in assessing the likely damages, the defendant must include exposure to attorneys' fees. Like other kinds of cases, most civil rights cases settle before trial. The settlements are based upon the lawyers' common assessments of the likelihood of success on the merits, and plaintiffs' counsel receive their fees without actually incurring the risk of loss at trial.

In some civil rights cases, primarily those involving use of allegedly excessive force by police against unattractive plaintiffs, however, it is extremely difficult for the plaintiff to prevail, and virtually impossible to obtain a recovery large enough to support a reasonable fee. This is so regardless of the merits of the claim, or the skill, experience or diligence of counsel. Many excessive force cases, such as the case at bar, pit admitted criminals against law enforcement officers. Jurors have no desire to believe criminals, or to reward them even if the jurors chance to believe their stories. On the other hand, jurors want to believe law enforcement officers, and hesitate to punish them for things done, even to excess, while acting in an "on-duty" capacity. Often such cases present a swearing match between police officers and an alleged

excessive force victim as the only issue to be decided by the jury. Often there is virtually nothing a lawyer can do through the application of skill, experience or time to change the jurors' preconceptions of relative credibility.

The more unattractive the plaintiff, the harder it is for him to prevail, and the more certain it is that even if he does prevail the damages will be nominal. Not surprisingly, counsel for law enforcement are loath to pay out money voluntarily to "common criminals," their relatives, or the lawyers who represent them. The more usual reaction is that the plaintiff deserved whatever he got, and the lawyer deserves nothing. Thus, the chances of settlement are not high, even if the plaintiff is willing to accept a settlement which reflects not only the risk of loss inherent in the dispute on the merits, but also his peculiar unattractiveness as a claimant. Lawyers who take on cases to vindicate the rights of unattractive plaintiffs can almost count on being put to trial. The time must be invested, and the risk of loss actually taken, before the lawyer has a chance of any fee at all.

The difficulties that excessive force plaintiffs face do not indicate that too many such cases are being filed. The value of having such cases filed is not fairly reflected by their probability of success on the merits. The stories told by the plaintiffs and the officers in excessive force cases usually differ dramatically. Even where the officers' version is fairly believed, and the jury concludes that the force used was objectively "reasonable," the plaintiff's subjective belief that the force used was unreasonable invariably seems firm. Regardless of their outcomes, this court has yet to hold a trial on an excessive force case which did not deserve its day in court. The protection of

Constitutional rights does not depend on the social acceptability of the person whose rights are abused.

C. Compensating for Undesirability: Adjusting the Lodestar

Because it is difficult for unattractive plaintiffs to prevail in undesirable cases for reasons unrelated to the relative merits of the claim or to the difficulties in establishing those merits which are "ordinarily reflected in the lodestar," a fee computation which considers only those two factors is not "reasonable," and will not attract enough lawyers to take those cases.

The alternative to awarding a multiplier in cases which fit the definition of undesirable cases used here is to adjust either factor in the lodestar equation to produce a higher fee. The number of hours expended by the attorney, however, is a constant. It can be adjusted downward to reflect waste, but presumably not upward to reflect efficiency. In any event, the difficulty of establishing the merits of an undesirable case is generally not related to the amount of time expended. Simply billing more hours, no matter how they are spent, is not likely to have much effect on jurors' preconceptions about the relative credibility or entitlement to judgment of criminals and police officers.

The hourly rate charged by the attorney, on the other hand, might be adjusted to reflect the difficulty of prevailing in an undesirable case. Such an approach presents considerable difficulties, however. The Supreme Court has not explained how to determine a reasonable hourly rate. The Court seems to assume that lawyers who charge

by the hour have established set rates for substantially all matters they undertake. The Court also seems to assume that the hourly rates established by lawyers vary primarily by reference to relative differences in skill and experience. The former assumption is no doubt accurate, but the latter is more doubtful.

As this court understands the market for legal services, the legal specialty, the character of the law firm, and the type of clients it serves are the primary determinants of the hourly rates lawyers charge in competitive markets. For a given type of work, lawyers in large firms charge institutional clients far more per hour than is charged by lawyers of the same skill and experience in small firms to individual clients. Similarly, business trial lawyers charge their clients far more per hour in patent, antitrust or securities cases than lawyers of equal skill and experience charge their clients in insurance and other such cases, including excessive force cases.

In Los Angeles, and presumably in similar urban markets, excessive force cases constitute a distinct legal market. The determination of a "reasonable hourly rate" presents precisely the difficulty to which the Dague Court pointed in its discussion of contingent fees. There is no market comprised of hourly rate lawyers who take cases in which fees are awarded only to prevailing parties. Individual lawyers who represent plaintiffs on a contingent fee basis normally do not have a credible history of arm's length hourly billing.

There is, therefore, no basis for determining what a reasonable hourly rate should be in excessive force cases

other than the artificial market established by the judiciary using the lodestar approach to fee-shifting cases. "Reasonable" hourly rates are no more than what lawyers have told judges, and judges have repeated to them. Such rates have never been tested in a competitive marketplace; it is an open question whether any client would pay them voluntarily. In addition, adversaries in these cases lack the mutual trust and respect that private clients presumably share with their counsel, and thus plaintiffs' lawyers lack the usual incentives to keep their rates and hours reasonable. See Hensley, 461 U.S. at 441, 103 S.Ct. at 1943 (Burger, C.J., concurring).

The parties in this case have suggested two ways to determine the hourly rate for purposes of calculating the lodestar, neither of which seems appropriate to the circumstances. Plaintiffs' lead counsel asserts that his hourly rate should be equated to that charged by partners of comparable experience at a large international law firm. Counsel urges that such a rate has been accepted by other district courts, and on appeal, and therefore should be accepted by this court. No doubt the large firm rate, if uniformly granted, would easily attract competent counsel to even the most undesirable excessive force cases. Perhaps this is what the Supreme Court intends.

Defendants ask, however, why a reasonable hourly rate for plaintiffs' counsel in excessive force cases should be higher than that charged competitively by the lawyers who regularly defend such cases. Defendants suggest a rate equivalent to the rate charged by lawyers of comparable skill and experience in premier excessive force defense firms.

The defendant has the better of this argument as to most excessive force cases. There is nothing inherently undesirable about excessive force cases. The common denominator of most of them is that the force allegedly used upon the plaintiff was disproportionate to the seriousness of the crime he was suspected of committing.

A plaintiff who was a "suspect" at the time the allegedly excessive force was used against him, but in fact had committed no crime, is not always at a disadvantage when pitted against police officers who injured him seriously. The case brought on behalf of such a plaintiff, therefore, may not be an "undesirable" case as that term is used here, and there may be no need to enhance the fee determined by the lodestar calculation.

As to all fee-shifting cases, including excessive force cases, this court believes that a reasonable hourly rate should be determined by looking to the rate normally charged by lawyers of comparable skill and experience who routinely defend similar cases. To award hourly rates commensurate with those routinely charged by trial lawyers involved in other legal specialties would overcompensate the civil rights plaintiff's lawyer, unduly penalize the defendant, and subsidize the lawyer for taking a nonmeritorious claim. These results contravene Dague and the fee-shifting statutes themselves.

On the other hand, foreclosing enhancement altogether would only exacerbate the difficulty that would-be

plaintiffs already have in finding counsel to prosecute meritorious claims.[9]

IV. Applying the Undesirable Case Analysis to this Case

The court doubts that any lawyer in the greater Los Angeles area, other than plaintiffs' lead counsel, would or could have represented them in this case, and devoted the time, effort and skill which it took to produce the verdict. If counsel were to be compensated only for the number of hours expended at the same rate charged by defense counsel in this case, he would be seriously under-compensated for the service performed, and the court is fully satisfied that the fee award would be insufficient to attract comparable counsel to similar cases in the future.

In this case, the role of the plaintiffs' attorney as a private attorney general was maximized. Although only collaterally, the case exposed to public view the LAPD's

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[9] This case does not require the court to give careful consideration to undesirable cases outside the area of excessive force. It seems likely, however, that the analysis here would apply equally to all cases involving a meritorious claim that would produce a higher economic recovery if not for the unattractiveness of the plaintiff. The lodestar figure will be too low to attract attorneys. Failing to enhance the fee by either a multiplier or a higher hourly rate would thus violate the statutory preference that meritorious lawsuits be brought. The court wonders whether further analysis might cause it to distinguish between two classes of fee-shifting statutes. In one class, the economic recovery would be high enough that the case would be brought even without a fee-shifting statute, but the Congressional intent was that the recovery be net of fees. In the other class, such as Section 1988, the Congressional intent was that meritorious cases would be brought in the first place.

questionable alleged practice of surveilling persons suspected of violent crimes and then watching, without intervening, the suspects commit another crime before arresting them. The trial came soon after the publication of the Christopher Commission Report and shortly before the verdict in the Rodney King case, at a time when the controversy over the LAPD's use of force was at its height. The case may also be thought by some to have provided an illustration of the "code of silence" referred to in the Christopher Commission Report, since the testimony of all twenty-one officers who participated in the McDonald's surveillance on February 12, 1990 did not conflict on any material issue. The case also showed, in spite of the convincing nature of the evidence summarized above, how difficult it is for plaintiffs who are undeniably serious wrongdoers to get a jury verdict in their favor, and how nearly impossible it is for them to obtain a significant economic recovery.

Plaintiffs' lead counsel has suggested an hourly fee of $350 per hour for himself and his partner Marion Yagman, and of $235 per hour for Edward Figaredo, with whom he was associated in the case. The court finds these rates to be reasonable in light of the peculiarly undesirable aspects of this case. Plaintiffs' counsel submitted time sheets detailing a total of 850.75 hours spent on the case itself and on the motion for attorney's fees. Marion Yagman's time sheets show 505.5 total hours, and Edward Figaredo's time sheets show 137 total hours. The court finds, however, that plaintiffs' counsel kept their time records with significantly less care and detail than is usually required of attorneys who bill by the hour. Thus, the court has been unable to verify the reasonableness of

the number of hours expended and has concluded that the total should be reduced by 15% for each of plaintiffs' attorneys. The adjusted hours, then, are 723, 429 and 116, respectively. Multiplying the adjusted figures for hours spent by plaintiffs' counsel's requested rates yields fees of $253,050, $150,150 and $27,260, respectively, for a total fee award of $430,460.

Defendants objected that plaintiffs' counsel's proposed rates are too high. Defendants did not propose specific alternative rates, but to guide the court's exercise of discretion, they presented the hourly rates they pay to private counsel with whom they contract to defend civil rights cases. Those rates are as follows: $175 per hour maximum; $125 to $135 per hour for attorneys of partner status and experience; and $90 to $125 per hour for associates. In this rate schedule, both Stephen and Marion Yagman deserve the maximum rate of $175 per hour, and Figaredo deserves $125 per hour, the top rate for associates. Multiplying these rates by the adjusted hours yields fees of $126,525, $75,075 and $14,500, respectively, for a total fee award of $216,100.

The court finds the rates suggested by defendants to be appropriate for ordinary excessive force cases handled on a contingency fee basis. In this case, however, the court believes that a multiplier of 1.75 would have to be added to reflect the peculiarly undesirable nature of this case from the standpoint of a lawyer who regularly accepts employment on a contingent fee basis. Enhancing the lower lodestar fee by a multiplier of 1.75 yields a total fee of $378,175.

For the reasons stated, namely that the higher hourly rate is not actually being paid to plaintiffs' lawyers in this market, and that the need for enhancement inheres in factors peculiar to the undesirable excessive force case, the court chooses the lower lodestar plus multiplier and awards a fee of $378,175.

IT IS SO ORDERED

APPENDIX C

UNDER SEAL